

**Exhibit 34  
(Redacted)  
(Previously Filed Under Seal as Dkt. 415)**



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1 cases multiple licenses.  
 2       Also in the consulting environment  
 3 there were often multiple software licenses. If  
 4 there were multiple, and in most cases there  
 5 were, companies making proposals to my clients, I  
 6 in many cases reviewed the licenses of more than  
 7 just the desired or selected provider.  
 8       So while I say -- and perhaps 150  
 9 of those instances involved analyzing and  
 10 negotiating software licenses, in many of those  
 11 150 I analyzed multiple software licenses, and in  
 12 some of them I was involved in negotiation of  
 13 multiple software licenses.  
 14       Q. In connection with your statement  
 15 about your professional involvement in analyzing,  
 16 drafting, and/or negotiating several hundred  
 17 software licenses, what types of software are you  
 18 referencing?  
 19       **A. Business-oriented software.**  
 20       Q. Such as what?  
 21       **A. Many of them are what would be**  
 22 called enterprise software, which touches many  
 23 areas within a business from operations to  
 24 accounting to administrative. Many of them were  
 25 specialized software for particular business

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1 applications. Virtually all of them were  
 2 business related -- business software -- related  
 3 to business software rather than technical  
 4 software or software oriented toward say  
 5 controlling equipment or system software.  
 6 Although there was some of that.  
 7       Q. With respect to your statement  
 8 about your professional involvement in analyzing,  
 9 drafting, and/or negotiating several hundred  
 10 software licenses, did any of those licenses  
 11 involve rules management software?  
 12       **A. Yes.**  
 13       Q. Could you identify those?  
 14       **A. The one that comes to mind is an**  
 15 ongoing case that's covered by a protective order  
 16 that I can't talk about, but most of them involve  
 17 rules management relating to configuration. It  
 18 could be configured to order manufacturing, it  
 19 could be configuration relating to distribution  
 20 of products.  
 21       So there would be rules as to what  
 22 product can go with what product, or if you buy  
 23 this one you have to buy that one, and you can't  
 24 get that one because it doesn't work with it. So  
 25 most of them were configuration management rules

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1 that I recall.  
 2       Q. In the case that you referenced  
 3 involving protective order, who were you retained  
 4 by?  
 5       **A. I was retained by a firm called**  
 6 AZA, Anaipakos something. This --  
 7       Q. Is this -- go ahead.  
 8       **A. They're very lengthy names. The**  
 9 firm goes by the name of AZA.  
 10       Q. What does that stand for?  
 11       **A. Anaipakos I believe is the name of**  
 12 the first individual. The second and third  
 13 individuals, one's last name begins with Z and  
 14 the next one begins with A.  
 15       Q. And who -- what is the party on the  
 16 opposite side of that lawsuit?  
 17       **A. Pardon me?**  
 18       Q. Could you identify the party on the  
 19 other side of that lawsuit?  
 20       **A. Ford Motor Company.**  
 21       Q. Where is that lawsuit venued?  
 22       **A. Detroit.**  
 23       Q. Do you know whether it's state  
 24 court or federal court?  
 25       **A. Federal.**

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1       Q. Do you know who the judge is?  
 2       **A. No.**  
 3       Q. Who are the attorneys for AZA?  
 4       **A. They've changed over a period of**  
 5 time. AZA is the law firm, not the litigant. I  
 6 was engaged by the law firm. And the one  
 7 constant is a Mr. Mitby. Steven Mitby,  
 8 M-I-T-B-Y.  
 9       Q. Who does AZA represent in that  
 10 case?  
 11       **A. A company called Versata,**  
 12 V-E-R-S-A-T-A.  
 13       Q. What is the subject matter of that  
 14 lawsuit?  
 15       **A. It's an intellectual property,**  
 16 trade secret -- well, there are a number of  
 17 issues. My issues were related to trade secret.  
 18       Q. Does it involve software licenses?  
 19       **A. Yes.**  
 20       Q. Do you provide any -- have you  
 21 provided any opinions in that case relating to  
 22 software licenses?  
 23       **A. I haven't provided any opinions in**  
 24 that case. I was a consulting expert.  
 25       Q. So in that case did you prepare an

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1 expert report?

2       **A. No.**

3       Q. In this case would you say that  
4 analyzing comparable software licenses is  
5 relevant to your task?

6       **A. Would I say that analyzing software**  
7 licenses is relevant, yes.

8       Q. Would you say that analyzing  
9 comparable software licenses is relevant to your  
10 task?

11      **A. In terms of knowledge of what**  
12 comparable -- what is in comparable software  
13 licenses, yes, very relevant.

14      Q. How so?

15      **A. Well, because in many cases my**  
16 opinions deal with what is normal and customary  
17 in software licenses for in -- for similar  
18 specially purpose and general purpose business  
19 software.

20      Q. What experience do you have with  
21 regard to the performance of obligations due  
22 under a software license agreement?

23      MR. HINDERAKER: Object to the  
24 question as vague.

25      THE WITNESS: I don't understand Page 37

1 what you're asking me.

2 BY MR. FLEMING:

3       Q. Have you provided -- have you  
4 worked as an expert witness in any case involving  
5 the question as to a party's obligations under a  
6 software license agreement?

7       MR. HINDERAKER: Same objection,  
8 vagueness.

9       THE WITNESS: In a general sense,  
10 many of the cases involved what was in the  
11 software license, as well as the actions of the  
12 licensor and licensee.

13      As best I understand your question,  
14 that's the most relevant answer I can give you.

15 BY MR. FLEMING:

16      Q. And you're referencing cases in  
17 which you've testified as an expert?

18      **A. Yes.**

19      Q. Okay. Can you identify those  
20 cases?

21      MR. HINDERAKER: I'm going to  
22 object to the question to the extent it's asking  
23 for disclosures that are beyond Rule 26. And  
24 Mr. Hilliard's disclosures and conformance with  
25 Rule 26 regarding his prior experience over the Page 38

1 last, I think it's four years that are required

2 by the rule are in your possession.

3       MR. FLEMING: Go ahead.

4       THE WITNESS: I'd be happy to  
5 address the cases on page 37 of my report, which  
6 are the ones within the past four years.

7       And could you ask the question  
8 again, or could we read back the question so that  
9 I'm answering it specifically.

10      MR. HINDERAKER: Sure.

11      (Whereupon, the requested portion  
12 was read back by the reporter.)

13      THE WITNESS: Could you read the  
14 prior question. When you say "those cases," I --

15 cases relating --

16      (Clarification by the court  
17 reporter.)

18      MR. FLEMING: You have to go to the  
19 question before that.

20      THE WITNESS: The prior question, I  
21 think.

22      (The requested portion was read  
23 back by the court reporter.)

24      THE WITNESS: I'm trying to  
25 remember the details of the cases. The Page 39

1 Hodell-Natco dealt with SAP's -- SAP America's  
2 involvement in performance of services under a --  
3 there may have been an implementation contract  
4 rather than a software license. I don't know  
5 that there were licensing issues, but there may  
6 have been.

7       State Controller's Office versus  
8 SAP Public Services was an implementation  
9 contract. I reviewed the software license, but I  
10 don't believe that there were software licensing  
11 issues there.

12      The Gish versus Meisenheimer did  
13 not have any.

14      The QAD versus Ingersoll-Rand did  
15 involve software licensing issues, although I  
16 don't recall specifically off the top of my head  
17 what they were.

18      And the Armour Capital Management  
19 versus SS&C Technology involved, as I recall,  
20 both software licensing and implementation  
21 issues.

22 BY MR. FLEMING:

23      Q. So do you recall any cases in which  
24 you've testified as an expert witness relating to  
25 a party's obligations under a software license Page 40

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1       **A. I would expect there to be some**  
 2   negotiation, and that the negotiation to be based  
 3   on -- on the parameters that the licensor  
 4   normally uses for setting fees and discussions  
 5   between the licensor and licensee, which may or  
 6   may not address the usage.

7       Q. So you would not expect a software  
 8   licenser in FICO's position in 2016 to request  
 9   some information about how the licensee was using  
 10   the software prior to demanding an increased fee,  
 11   correct?

12       MR. HINDERAKER: Objection;  
 13   misstates the testimony.

14       THE WITNESS: I'm saying I would  
 15   expect there to be some discussion. I would  
 16   think that that would come up in the discussion.  
 17   The imperatives in your question, the demanding  
 18   and so forth, it wouldn't -- normally there's a  
 19   good business relationship, and it's not an  
 20   imperative and a demanding kind of situation as  
 21   you've described it. And I would expect that to  
 22   come up, but I don't know necessarily that it  
 23   would always have to come up.

24       BY MR. FLEMING:

25       Q. Are you saying that FICO was

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1   entitled to an increased licensing fee whether or  
 2   not there was any change in the way Blaze was  
 3   being used as a result of the merger?

4       **A. I'm saying that the contract says**  
 5   what it says with regard to that, and what it  
 6   says is normal and customary.

7       Q. No, I'm asking whether you believe  
 8   that FICO was entitled to an increased licensing  
 9   fee whether or not there was any change in the  
 10   way Blaze was being used as a result of the  
 11   merger?

12       **A. I believe that would be that what**  
 13   FICO did was normal and customary. I believe  
 14   that the discussions over increased licensing  
 15   fees are normal and customary, and that the  
 16   contract says what it says, and it would be  
 17   normal and -- regarding the consent for  
 18   assignment and the way that FICO dealt with Chubb  
 19   in that regard was consistent with what the  
 20   contract said, and was normal and customary in  
 21   the industry.

22       I think I cited both Landy and  
 23   Classen in that regard, as well as my own  
 24   experience.

25       Q. Mr. Hilliard, I know it's getting

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1   late. We've been going a long time today, but --  
 2       MR. HINDERAKER: Almost seven  
 3   hours.

4       **BY MR. FLEMING:**

5       Q. Continuing to say the contract says  
 6   what it says is not responsive to my question,  
 7   and I'd like an answer.

8       Is it your opinion that FICO was  
 9   entitled to an increased licensing fee whether or  
 10   not there was any change in the way Blaze was  
 11   being used as a result of the merger?

12       **A. I believe the contract says that**  
 13   FICO was entitled to do that, and I feel that  
 14   FICO was entitled to rely on what the contract  
 15   said.

16       Q. The contract says that they were  
 17   entitled to an increased licensing fee, is that  
 18   what you're saying?

19       **A. The contract says that there is --**  
 20   that consent is required, that there is no  
 21   assignment without consent, and the normal way  
 22   that consent occurs in situations where one -- as  
 23   Landy and Classen agree, the normal way in  
 24   situations where there is an acquisition by a  
 25   much larger entity that increases in license fees

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1   are normal and customary regardless of use.  
 2       Q. On page 22 of your report you state  
 3   that as negotiations between FICO and Chubb  
 4   continued in 2016, FICO learned of several  
 5   installations of the Blaze Advisor software that  
 6   had previously been done outside of the United  
 7   States, right?

8       **A. Yes.**

9       Q. And you reviewed Dr. Kursh's report  
 10   relating to the documents he referred to in  
 11   connection with FICO's prior knowledge of foreign  
 12   use, right?

13       **A. I reviewed Dr. Kursh's report in**  
 14   that regard, yes.

15       Q. How can you claim that FICO just  
 16   learned of this foreign use in 2016?

17       That's not accurate, is it?

18       **A. It had learned of some prior to**  
 19   2016. There was use, but it didn't necessarily  
 20   learn of all of the installation until 2016,  
 21   which would have been the unlicensed use. And I  
 22   think there was actually a specific new -- at  
 23   least one specific new incidence of unlicensed  
 24   installation or of installation outside the  
 25   United States that FICO was not aware of, at

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1 least one, that it didn't become aware of until  
 2 2016.  
 3 Access to the software without the  
 4 installation of the software outside the U.S.  
 5 would not necessarily have been contrary in  
 6 violation of the license. And I don't know  
 7 whether it was 2016 or exactly when -- I don't  
 8 recall exactly when FICO became aware of  
 9 installations not permitted by the license, or  
 10 the date at which FICO became aware of disclosure  
 11 of the software through consultants that aren't  
 12 specifically named in Section 3.6 of the license  
 13 agreement. I think at least one of those  
 14 instances occurred in 2016.

15 Q. Throughout your report you use the  
 16 phrase "consistent with the normal customs and  
 17 practices of the commercial software industry."

18 How is that any different than the  
 19 phrase that Dr. Kursh uses which is  
 20 "commercially reasonable"?

21 **A. It's very different. The**  
 22 difference is that in my case it is based on my  
 23 experience backed up by learned treatises,  
 24 third-party sources that confirm my experience.

25 And it's evaluable not only on my experience, Page 233

1 but what the third-party sources say.

2 In Dr. Kursh's case, he refers  
 3 to -- he attempts to make a definition of what he  
 4 means by commercially unreasonable, and I think  
 5 he has three different factors. His experience,  
 6 the customs and practices of Chubb, the customs  
 7 and practices of FICO, and I think one other. He  
 8 doesn't say how they're combined, but he says  
 9 it's a combination of those three.

10 There's no way to evaluate what he  
 11 means by that because he's combined so many  
 12 different things. Whereas I've been very  
 13 specific about what I mean by customs and  
 14 practices of the industry, and I've backed it up  
 15 with third parties.

16 Q. Mr. Hilliard, I'd like to talk  
 17 about your opinions relating to discounts.

18 **A. Certainly.**

19 Q. On page 25 of your report you state  
 20 that FICO's discounting process is consistent  
 21 with the custom and practices of the commercial  
 22 software industry.

23 **A. Page?**

24 Q. 25.

25 **A. 25. Yes.**

1 Q. And you go on to state that the  
 2 last custom pricing process is exactly what FICO  
 3 did in developing the license fee quote it gave  
 4 to Federal in March of 2016 when it offered a  
 5 discounted fee level of [REDACTED] is that  
 6 right?

7 **A. [REDACTED] There were three**  
 8 different proposals that the most -- the one with  
 9 the greatest discount was [REDACTED]

10 Q. So a [REDACTED] discount would be  
 11 consistent with industry norms; is that right?

12 **A. Discounts vary, but it would -- for**  
 13 a discount for an expanded license with a major  
 14 client with potential worldwide use, it's  
 15 certainly within the range that would be normal  
 16 and customary.

17 Q. On page 23 you summarize  
 18 Dr. Kursh's opinions on discounts, and you state  
 19 that Dr. Kursh asserts that the way that FICO  
 20 determined the license fees it quotes to  
 21 prospective and current customers is inconsistent  
 22 with software industry norms, and you go on to  
 23 state that based on your experience, Dr. Kursh is  
 24 wrong.

25 Can you summarize your experience Page 235

1 with pricing software similar to Blaze Advisor?

2 **A. Certainly. Working as a consultant**  
 3 in over 200 engagements, the vast majority of  
 4 which were engagements where my clients acquired  
 5 business software, in some cases special purpose  
 6 industry oriented business software, in other  
 7 cases general purposes what's known as ERP  
 8 software, I was involved in seeing the pricing  
 9 and discounting that were offered to my clients.

10 And in my work -- and prior to that  
 11 when I had worked in computer companies, I was  
 12 involved in decisions on discounting -- now this  
 13 is some years ago because I've been working as a  
 14 consultant since 1980, but I was involved in  
 15 negotiating discounts with clients, so I'm  
 16 familiar from that experience.

17 And then in work as an expert  
 18 witness, many of the cases that I've been  
 19 involved in, the issues in the case related to  
 20 discounts that were given for business software  
 21 applications. Some cases special purpose, some  
 22 cases general purpose.

23 Q. Okay. Mr. Hilliard, we've just got  
 24 a little bit of time left, but what is your  
 25 experience with pricing software similar to Blaze Page 236

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1 Advisor? I think you've -- that's the question  
 2 I'd like an answer to.  
 3 **A. When I'm referring to similar to**  
 4 Blaze Advisor, what I'm referring to is business  
 5 application software. And in some cases that  
 6 would be special purpose business applications  
 7 such as Blaze Advisor. In other cases it would  
 8 be general purpose business application software  
 9 such as, for instance, Oracle Financials or  
 10 PeopleSoft ERP software. PeopleSoft now being a  
 11 part of Oracle. Or Lawson software or others.  
 12 And I'm familiar -- and so all of those would be  
 13 business application software like Blaze Advisor.  
 14 Q. Okay.  
 15 **A. And that's what I'm familiar with.**  
 16 Q. Would you agree that database  
 17 software is an example of system software, the  
 18 category of software that includes operating  
 19 systems which is entirely different from  
 20 application software like Blaze that perform  
 21 business functions?  
 22 **A. Yes.**  
 23 Q. Okay. What are some other examples  
 24 of application software in the market today?  
 25 **A. Oracle Financials, SAP-1, Lawson's** Page 237

1 **ARP software, SAP's R/3. Boy, I mean, Microsoft**  
 2 Dynamics. I think there are four -- at least  
 3 three different Microsoft Dynamics' products.  
 4 There are software applications for different  
 5 kinds of professional businesses and so forth.  
 6 The ones I've given you are brand  
 7 name products that you might have heard of.  
 8 Q. What is your understanding as to  
 9 who are the main competitors to Blaze software in  
 10 the marketplace?  
 11 **A. Yeah, I looked at the main**  
 12 competitors that were listed in the Forrester  
 13 report. And as we sit here today, I'm not  
 14 recalling them off the top of my head.  
 15 Q. On page 26 of your report you state  
 16 that commercial software pricing methods are very  
 17 fluid.  
 18 Are you saying it's impossible to  
 19 quantify the market rate for a license in this  
 20 situation?  
 21 **A. I don't understand your question.**  
 22 What do you mean by the market rate  
 23 for a license?  
 24 Q. What do you mean when you say that  
 25 commercial software pricing methods are very

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 1 fluid?  
 2 **A. I mean that for different**  
 3 business -- business software and different  
 4 software licensors, pricing can be very --  
 5 everything from very rigid as it would for  
 6 off-the-shelf consumer software or off-the-shelf  
 7 software that gets installed by businesses with  
 8 no implementation or customization, on up to very  
 9 variable by company and licensor ranging from  
 10 hundreds of dollars to millions of dollars with  
 11 discounts ranging from nothing to a substantial  
 12 portion of list price.  
 13 And you'd have to look at  
 14 individual -- individual software -- markets for  
 15 individual software applications, ERP  
 16 applications. General purpose ERP applications  
 17 might be one thing, special purpose -- and by ERP  
 18 I mean general purpose business software. The  
 19 term ERP means enterprise resource planning. The  
 20 name doesn't connote what it actually is. It's  
 21 a -- comes out historically.  
 22 Q. So did you --  
 23 **A. So it just depends on the software.**  
 24 But by very fluid I mean the amount of the  
 25 license varies by type of software, and the level

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 1 of discounting varies both by type of software  
 2 and by market.  
 3 Q. Did you attempt to determine the  
 4 fair market value of the Blaze software license  
 5 as of 2016 or presently?  
 6 **A. I have not attempted to do that,**  
 7 no.  
 8 Q. How would you go about doing that?  
 9 **A. The fair market value. The fair**  
 10 market value is what FICO sells it for to its  
 11 customers. So you'd have to look at the way --  
 12 what price FICO has determined to sell its  
 13 software licenses at, and whether it's able to  
 14 sell substantial numbers of licenses at those  
 15 prices.  
 16 Q. But you have not provided an  
 17 opinion as to the fair market value of the Blaze  
 18 license either as of 2016 or presently, correct?  
 19 **A. Correct.**  
 20 MR. FLEMING: All right. That's  
 21 all I have.  
 22 MR. HINDERAKER: Okay. I guess I  
 23 have one question.  
 24 **EXAMINATION**  
 25 **BY MR. HINDERAKER:**

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